

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Bozidar Ferek-Petric Examiner: B. Mehta
Serial No.: 10/695,848 Group Art Unit: 3767
Filed: October 29, 2003 Docket: P0010438.01
Title: IMPLANTABLE ELECTROPORATION THERAPY DEVICE AND METHOD
 FOR USING SAME

RESPONSE TO NOTICE OF NON-COMPLIANT APPEAL BRIEF (37 CFR § 41.37)

Mail Stop Amendment
COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

This is in response to the Notice of Non-Compliant Appeal Brief (37 CFR § 41.37), dated May 5, 2009, in the above-identified application.

The Appeal Brief filed on April 6, 2009, was said to be non-compliant as the argument section must match the grounds section inasmuch as each ground corresponds to a heading within the argument section. In accordance with the instructions in the Notice, only the arguments section that was found defective is filed with this Response.

It is believed that no fees are owed at this time; however, the Commissioner is authorized to charge any deficiencies and credit any overpayments to Deposit Account No. 13-2546.

Remarks

With this response, an earnest effort has been made to respond to all issues raised in the Notice of Non-Compliant Appeal Brief. In view of the above, it is submitted that the application is in condition for allowance and reconsideration of the application is requested.

Respectfully submitted,

June 5, 2009

Date

/Reed A. Duthler/

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VII. Argument

A. Rejection of claims 46 – 48, 50 – 52, 56 and 57 under Section 103(a) as unpatentable over Whitehurst, et al. (US Patent No. 6,733,485) in view of Houben, et al. (US Patent No. 6,261,280).

All rejections under grounds A and B and perhaps D above are based upon the argument that Houben, et al. makes it obvious to add qRs synchronization to Whitehurst, et al., and thus produce the claimed invention as broadly claimed. However, this argument ignores the fact that synchronization in Houben, et al. is for a purpose completely inapplicable to the device of Whitehurst, et al. In Houben, et al. synchronization is provided to enable the sensing of signals (qRs complexes) from the tissue (the heart) produced in response to the applied treatment pulses. There several reasons why the argument for rejection is believed to be incorrect.

First, there is no sensed signal analogous to the qRs complex as sensed in Houben, et al. disclosed in Whitehurst, et al. Unlike the heart, treated by the Houben, et al device, the tumor tissue treated by the device in Whitehurst, et al. does not generate electrical signals to which treatment pulses can be synchronized or which are generated in response to the application of treatment signals. It is respectfully asserted that the teaching of Houben, et al. thus suggests there would be no benefit to any synchronization in a device as in Whitehurst, et al., teaching directly away from the invention as claimed in all pending claims. Certainly the rationale for synchronizing to qRs complexes presented by Houben, et al is inapplicable to the device of Whitehurst, et al.

Second, there is no teaching in Whitehurst, et al that the timing of the delivery of treatment pulses should be synchronized to any particular events or parameters whatsoever and no suggestion of any benefit that might be associated therewith.

Third, while the Whitehurst device does sense various parameters, most of them are chemical levels which do not provide any corresponding mechanism for facilitating synchronization of delivered treatment pulses thereto. While some form of closed loop control is discussed, it is believed that control of frequency, amplitude, duration of treatment pulses and/or general timing of therapy periods is intended, rather than control of timing of individual pulses or pulse bursts. See Column 21, lines 5 - 54. If there is asserted to be an obvious way to synchronize timing of delivery of treatment pulses to a pH level, for example, or how it would be beneficial in the context of treatment of a tumor, it is not disclosed. The same is true for the other sensed chemical parameters listed. The rationale of Houben, et al., clearly does not apply to and teaches away from the need for such synchronization. Even if there were some obvious benefit to synchronization of the treatment pulses in Whitehurst, et al. to sensed chemical levels, the resultant device would not much resemble the apparatus as presently claimed. In any case, whatever rationale for such synchronization could be gleaned from Whitehurst, et al. would not apply to synchronization of the tumor treatment pulses to qRs complexes.

Fourth, while Whitehurst does disclose sensing of an electrical physiologic parameter, perhaps using the stimulation electrode, the only electrical parameter specifically listed is an electro-myographic signal (EGM). These signals are emitted by skeletal muscles, not by the tumor being treated. Again, there is no disclosed mechanism for synchronizing delivery of treatment pulses to such sensed signals and no disclosed or obvious reason to do so. The rationale of Houben, et al., clearly does not apply to and teaches away from the need for such synchronization. Even if there were some obvious benefit to synchronization of the treatment pulses in Whitehurst, et al. to EMG signals, the resultant device would still not much resemble the apparatus as presently claimed. In any case, whatever rationale for such synchronization could be gleaned from Whitehurst, et al. would not apply to synchronization of the tumor treatment pulses to qRs complexes.

B. Rejection of claims 54 and 55 under Section 103(a) as unpatentable over Whitehurst, et al. (US Patent No. 6,733,485) in view of Houben, et al.(US Patent No. 6,261,280) in view of Sterzer (US Patent N. 5,386,837).

Sterzer is not cited for and does not address the deficiencies of Whitehurst, et al. in view of Houben, et al. as applied to claims 46 – 48, 50 – 52, 56 and 57 as discussed above.

C. Rejection of claims 58, 59, 63 – 65 and 67 under Section 103(a) as unpatentable over Weaver (US Patent No. 5,389,069) in view of Houben, et al.(US Patent No. 6,261,280) and Sterzer (US Patent N. 5,386,837).

All rejections under grounds C and D above are expressly based upon the argument that Houben, et al. makes it obvious to add qRs synchronization to Weaver, and thus produce the claimed invention as broadly claimed. However, this argument fails for the reasons discussed above in conjunction with Whitehurst, et al. Weaver, like Whitehurst, et al. treats tumors and contains no suggestion of synchronizing treatment signals to qRs complexes. Weaver, like Whitehurst, et al., contains no teaching that the rationale for synchronizing treatment pulses to qRs complexes in Houben, et al. has any applicability whatsoever. Further, unlike Whitehurst, et al, Weaver is not even cited as providing any signals useful for synchronizization. For the first and second reasons as discussed above in conjunction with Whitehurst, et al. and Houben, et al., the combination of Weaver and Houben, et al. is similarly not believed to render the invention as claimed obvious.

Sterzer is not cited for and does not address the deficiencies of Weaver in view of Houben, et al. as discussed above.

D. Rejection of claims 61, 62 and 66 under Section 103(a) as unpatentable over Weaver (US Patent No. 5,389,069) in view of Houben, et al. (US Patent No. 6,261,280) and Sterzer (US Patent N. 5,386,837) in view of Whitehurst, et al. (US Patent No. 6,733,485)

The addition of Whitehurst, et al to the combination of Weaver and Houben, et al., as in ground D, does not remedy the deficiencies of Weaver, for the third and fourth reasons discussed above in conjunction with Houben, et al and Whitehurst, et al. with regard to claims 46 – 48, 50 – 52, 56 and 57.

Withdrawal of the rejections based upon grounds A, B, C and D is respectfully requested.

The Commissioner is authorized to charge any deficiencies and credit any overpayments to Deposit Account No. 13-2546 for entry of the instant Response.

Respectfully submitted,

Date: June 4, 2009

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